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No. 06-343

IN THE

Supreme Court of the United States

QWEST COMMUNICATIONS INTERNATIONAL INC.,
Petitioner,

v.

NEW ENGLAND HEALTH CARE EMPLOYEES PENSION FUND, CLIFFORD MOSHER, TEJINDAR SINGH AND SAT PAL SINGH,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant certiorari to approve a litigant's "selective waiver" of ostensibly privileged documents, when (1) a thorough review of the circuit courts "indicates there is almost unanimous rejection of selective waiver," App. 13a, (2) the appellate court's ruling here turned upon a fact-bound, unique record, and (3) even if selective waiver were deemed desirable, legislative or rule-making bodies are the more-appropriate avenues within which to pursue the evidentiary concept.

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INTRODUCTION

Qwest's Petition asks this Court to review the unsurprising result of a fact-bound scenario: Despite knowing of overwhelming authority against its actions, Qwest attempted to employ a "selective waiver" by handing over to federal agencies more than 220,000 pages of ostensibly privileged documents—while insisting that those same documents remained privileged in a separate private action brought by Respondents.[1] Not surprisingly, the Tenth Circuit joined the

[1] Petitioner throughout its Petition uses the benign-sounding term "limited waiver" to describe its deliberate waiver of formerly privileged mate-

majority view rejecting selective waiver, and held that Qwest's gamble had failed.

Certiorari review is not warranted to correct Qwest's losing litigation bet. The circuit courts that have considered the issue are virtually unanimous in their rejection of selective waiver. Moreover, the Tenth Circuit took pains to explain numerous times that it was the fact-intensive *record before it* that resulted in its holding. Finally, the availability of some form of selective waiver in connection with government investigations—because it deals with evidentiary privileges—is better left for Congress to decide, as provided by 28 U.S.C. §2074(b).

The Petition should be denied.

STATEMENT OF THE CASE

Qwest shareholders ("Respondents") brought the underlying federal securities fraud class action in August 2001 against Qwest ("Petitioner") and various other defendants. The shareholders alleged that by making false and misleading statements concerning Qwest's financial results and business conditions, defendants violated federal securities laws including §§10(b), 20(a), and 20A of the Securities Exchange Act of 1934, and §§11 and 15 of the Securities Act of 1933.

Federal authorities also suspected something was amiss. In early February 2002, Qwest received a subpoena from

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rials. Respondents will use the term "selective waiver" in this Opposition, however, as (a) that is the term used throughout the Tenth Circuit's opinion that is the subject of the Petition, and (b) it is frankly more accurate. *See, e.g., Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1423 n.7 (3d Cir. 1991) (declining to use term "limited waiver rule," because it actually encompasses "two distinct types of waivers"—either "partial" or "selective"—and the latter more accurately describes situations in which a party "who has disclosed privileged communications to one party [attempts] to continue asserting the privilege against other parties").

the Los Angeles regional office of the Securities and Exchange Commission ("SEC"), seeking documents pertaining to Qwest's business dealings with bankrupt telecom corporation Global Crossing. By March 8, 2002, the SEC's regional office in Denver had begun an informal inquiry into Qwest's accounting. A month later, the SEC upgraded that inquiry to a formal investigation. In early July 2002, the U.S. Attorney's Office for the District of Colorado informed Qwest that it had commenced a criminal investigation of the company. (Later, it became clear that the criminal investigation's scope mirrored the SEC probe's.[2]) In late July 2002, Qwest announced that it would restate its reported financial results for 1999, 2000, and 2001. Qwest's stock price, which had at one time reached $57 per share, plummeted to around $1 per share by mid-2003.

In the face of the foregoing, Qwest agreed to cooperate—somewhat—with the SEC and DOJ investigations. Utilizing a series of letter agreements (the "Agreements") with the two government agencies spanning February 2003 through late 2005, Qwest agreed to provide the SEC and DOJ with certain documents (the "Confidential Materials") that Qwest claimed were otherwise protected under either attorney-client privilege or the work-product doctrine.

The Agreements' terms, as the Tenth Circuit Court of Appeals later explained, did little to prevent the agencies from further disseminating the materials to outside third parties. App. 27a-28a. For example, the February 11, 2003, Agreement between the SEC and Qwest specified that SEC staff would maintain the documents' confidentiality, "except

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[2] The United States Attorney in Denver told the Tenth Circuit Court of Appeals, in the underlying mandamus briefing, that Respondents' civil action against Qwest involves the same subject matter as the DOJ's ongoing criminal investigation and pending criminal cases. *See* the Department of Justice's ("DOJ") "Response to Petition for Writ of Mandamus" (hereafter "DOJ Response") at App. 73a.

to the extent that the Staff determines that disclosure is otherwise required by law *or would be in furtherance* of the Commission's discharge of its duties and responsibilities."[3] App. 69a. Qwest entered a similar February 10 Agreement with the DOJ, agreeing that the DOJ could "*share* the Confidential Materials with other State, Local and Federal agencies." App. 71a. On April 15, 2003, the DOJ and Qwest penned an even-more-expansive Agreement—this time specifying that the DOJ could make "full use of any information" it obtained via the Agreements "in furtherance of its investigation, *including, without limitation*, analyses, interviews, grand jury proceedings, court proceedings, [and] consultation with and support of other federal, state or local agencies."[4] The DOJ could even use the documents in "consultations with experts, or potential experts, and the selection and/or retention of testifying experts." As the U.S. Attorney in Denver later acknowledged, the Agreements did "*not require* the United States Attorney's Office to segregate material obtained from Qwest, file it under seal, keep records of its use, or otherwise deal with the information in any special way." App. 76a-77a. Indeed, the U.S. Attorney had not even "calculate[d] the quantity" of Confidential Materials "that has been further disseminated to third parties." *Id.* at 77a.

Pursuant to those Agreements, Qwest ultimately handed over to the government—but later refused to produce to Respondents in discovery—more than 220,000 pages of documents that it said were otherwise protected by either the attorney-client privilege or work-product doctrine. Notably, despite its purported desire to cooperate with the DOJ and SEC investigations, Qwest *still withheld* from the government

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[3] Emphasis is added throughout unless otherwise noted.

[4] The April 15, 2003, Agreement was attached as Ex. 3 to the DOJ Response, but is not reproduced in the Appendix.

another 390,000 pages of documents—based on attorney-client privilege and/or the work-product doctrine.

REASONS FOR DENYING THE PETITION

I. THE CIRCUIT COURTS ARE NOT IN DISARRAY ON THE QUESTION OF SELECTIVE WAIVER

Petitioner asserts that the circuit courts are hopelessly confused as to the availability of selective waiver. Petition at 7-11. But what Petitioner describes as a "kaleidoscope of different approaches and different outcomes," *id.* at 11, is actually a uniform prism of privilege law, through which stream various facts leading to case-specific results.

The Tenth Circuit pointed out this uniformity, explaining that while the concept of selective waiver was one of first impression there, "[o]ur review of the opinions of other circuits, however, indicates there is almost unanimous rejection of selective waiver." App. 13a; *see also* 6 James Wm. Moore, et. al., *Moore's Federal Practice* §26.49[5][g], at 26-184.10 (3d ed. 2006) ("The preferred view rejects the doctrine of selective waiver."). Indeed, "[o]nly the Eighth Circuit has adopted selective waiver in circumstances applicable to [Petitioner]." App. 13a.[5]

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[5] Indeed, Petitioner references a May 15, 2006, Memorandum from the Chair of the Advisory Committee on Evidence Rules to the Chair of the Standing Committee on Rules of Practice and Procedure, at page 23 n.14 of its Petition, that acknowledges selective waiver's disfavored status. While introducing Proposed Rule of Evidence 502, that Memorandum explains that "[m]ost federal courts have held that such a disclosure constitutes a waiver of the privilege, i.e., *the courts generally reject the concept* that a selective waiver is enforceable." *See* Page Two of the Memorandum from Jerry E. Smith, Chair of the Advisory Committee on Evidence Rules, to David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure (revised June 30, 2006) (on file with author), *available at* http:// www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf.

And the Eighth Circuit *is* the lone outlier when it comes to allowing selective waiver of attorney-client privileged materials. In *Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc), the defendant corporation in a civil proceeding claimed attorney-client privilege protection for some materials prepared by its counsel that it had handed over to the SEC in a separate, nonpublic investigation. *Id.* at 611. Although it is long-settled that the attorney-client privilege is lost if the client discloses the substance of otherwise privileged communications to a third party, *see, e.g.*, *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888), the Eighth Circuit held otherwise based on a dubious policy rationale: The court believed that a selective waiver was appropriate under the circumstances, or else corporations might be reluctant to employ "outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers." *Diversified Indus.*, 572 F.2d at 611. That bare sentence was the sum and substance of its analysis of the issue.[6]

Many other circuits that considered the issue in more depth, including the First, Second, Third, Fourth, Sixth, and D.C.—and now the Tenth—have since rejected the notion that a litigant can pick and choose to whom it wishes to divulge attorney-client privileged information while retaining the privilege as to others. *See, e.g.*, *United States v. Mass. Inst. of Tech.* ("*M.I.T.*"), 129 F.3d 681, 686 (1st Cir. 1997); *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982); *Westinghouse*, 951 F.2d at 1425; *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2002); *In re Qwest Commc'ns Int'l*, 450 F.3d 1179,

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[6] The *Diversified Indus.* opinion was described recently as having "but a paragraph of analysis as its birthright, no Circuit siblings, and moreover, is probably an orphan in its own home." *In re Lupron Mktg. & Sales Practices Litig.*, 313 F. Supp. 2d 8, 12 (D. Mass. 2004).

1192 (10th Cir. 2006) (reprinted at App. 1a-40a); *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981); *see also Genentech, Inc. v. United States ITC*, 122 F.3d 1409, 1417 (Fed. Cir. 1997) (acknowledging *Diversified Indus.*'s selective waiver, but noting "[t]his court, however, has never recognized such a limited waiver").[7]

Each circuit's rejection of selective waiver heeded the attorney-client privilege's underlying rationale: that its "purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Thus, the Second Circuit noted that a party's "claim that a need for confidentiality must be respected in order to facilitate the seeking and rendering of informed legal advice is not consistent with selective disclosure when the claimant decides that the confidential materials can be put to other beneficial purposes." *John Doe Corp.*, 675 F.2d at 489. Similarly, the Third Circuit explained that "selective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose." *Westinghouse*, 951 F.2d at 1425. The other circuits are in accord. *See, e.g.*, *Columbia/HCA Healthcare*, 293 F.3d at 302 ("any form of selective waiver, even that which stems from a confidentiality agreement, transforms the attorney-client privilege into 'merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage'") (citation omitted); *Permian*, 665 F.2d

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[7] *Genentech* did not present the issue of a selective waiver in circumstances resembling those here, but rather a waiver following inadvertent production of privileged materials. 122 F.3d at 1417. That said, the panel's comment illustrates yet another circuit's disapproval of selective waiver.

at 1221 n.13 ("Unlike the Eighth Circuit, we cannot see how 'the developing procedure of corporations to employ independent outside counsel to investigate and advise them' would be thwarted by telling a corporation that it cannot disclose the resulting reports to the SEC if it wishes to maintain their confidentiality.") (citation omitted).

A majority of the circuits to have considered the issue similarly reject selective waiver of non-opinion, or "fact," work product.[8] Ironically, among those myriad circuits is the Eighth Circuit, which in 1978 had created the concept of selective waiver for *attorney-client* privilege in its *Diversified Indus.* opinion. App. 19a-20a. Some ten years later the Eighth Circuit *rejected* selective waiver in the context of fact work product. *See In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 845 (8th Cir. 1988). Chrysler had produced a computer tape containing work product to *its adversaries* in a civil litigation settlement pursuant to a confidentiality agreement, yet tried to withhold the same materials from the U.S. Attorney. *Id.* at 845. After determining that the tape was not opinion work product, the Eighth Circuit held that "Chrysler waived any work product protection by voluntarily disclosing the computer tape to its adversaries . . . during the due diligence phase of the settlement negotiations." *Id.* at 846. The non-waiver/confidentiality agreement Chrysler entered into with the class-action plaintiffs was irrelevant; the crucial fact was that Chrysler had not kept its computer tape confidential. *Id.* at 847.

Several other circuits, including the First, Third, Fourth, Sixth—and now, the Tenth—are in accord. *See, e.g.*, *M.I.T.*, 129 F.3d at 687 ("prevailing rule [is] that disclosure to an adversary, real or potential, forfeits work product protection"); *Westinghouse*, 951 F.2d at 1429 (attempted selective

[8] Respondents agree that any waiver of "opinion" work product is not at issue in the Petition. Petition at 6 n.3.

waiver as part of ostensible cooperation with government is "foreign to the objectives underlying the work-product doctrine"); *Martin Marietta*, 856 F.2d at 625 ("disclosure by Martin Marietta to the federal government, the United States Attorney and the DOD, when the government and Martin Marietta were adversaries," comprised waiver of non-opinion work product); *Columbia/HCA Healthcare*, 293 F.3d at 307 (rejecting work product selective waiver as improper strategic tool); App. 24a ("having considered the purposes behind . . . the work-product doctrine as well as the reasoned opinions of the other circuits," selective waiver is unavailable).

Two circuits have left open the *possibility* of a selective waiver of non-opinion work product, but only under circumstances not present here. Although the D.C. Circuit, in *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982), declined to retain the work-product protection of documents a company had previously made available to the SEC, *id.* at 824, it noted there was no evidence that the company had "ever reached an explicit agreement with the SEC" not to disclose the materials to third parties. *Id.* at 820. Thus, that circuit intimated that such an "*explicit*" agreement under the right circumstances *might* justify a selective waiver. *Id.* at 824 (hypothesizing that government agencies "could expressly agree to any limits on disclosure to other agencies"). Similarly, the Second Circuit held that litigants had waived a memorandum's work-product protection by disclosing it to the SEC, but merely declined "to adopt a per se rule that all voluntary disclosures to the government" must always work a waiver. *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993). The Second Circuit thought that a *per se* rule would not cover situations in which the SEC and disclosing party had entered into "an *explicit* agreement that the SEC *will maintain the confidentiality* of the disclosed materials." *Id.*

As explained more fully *infra* in Section II, the Agreements at issue here were anything but "explicit," tightly

woven instruments designed to keep privileged materials out of third parties' hands. To the contrary, they were non-specific and porous, giving both the DOJ and SEC broad discretion to disclose and disseminate the materials to third parties—provided it was in "furtherance" of the government investigators' duties. "[A]ny restrictions on their use were loose in practice." App. 27a. Faced with such wide-open agreements, no doubt even the D.C. and Second circuits would reject the availability of a selective waiver.

Given the foregoing, Petitioner's asserted "confusion" among the federal appellate courts is illusory. It is doubtful the various circuits would reach a different result if presented with the same or similar facts, and this Court's intervention *in this case* is not needed to iron out whatever minor differences may exist between them. A far better course would be to allow the circuits to continue their refinement of the concept's availability in discrete situations.[9]

II. CERTIORARI IS ALSO UNWARRANTED BECAUSE THE TENTH CIRCUIT DECIDED THE ISSUE BASED UPON A FACT-INTENSIVE RECORD UNIQUE TO THIS CASE

Petitioner accuses the Tenth Circuit of "adher[ing] to a rigid dogma" and broadly "holding that disclosure of privileged information to the government waives privileges and work product protections to the universe at large," Petition at

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[9] *See Brown v. Texas*, 522 U.S. 940, 118 S. Ct. 355, 357 (1997) (Stevens, J.) (writing on denial of certiorari that "the likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals 'to serve as laboratories in which the issue receives further study before it is addressed by this Court'") (citation omitted); *see also* Samuel Estriecher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U.L. Rev. 681, 716 (1984) ("[t]he process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule").

17, but even a cursory reading of the panel's opinion belies the accusation. The Tenth Circuit did not issue a sweeping, blanket holding; rather, no fewer than 15 times did the panel emphasize that it was the *record in this case* driving its conclusion. *See, e.g.*, App. 24a ("we conclude the record in this case is not sufficient to justify adoption of a selective waiver"); App. 25a ("The record before us, however, does not support the contention that companies will cease cooperating with law enforcement absent protection under the selective waiver doctrine."); App. 26a ("The record is equally deficient concerning whether the DOJ and the SEC may have independently gained access to the Waiver Documents by invoking other means or theories . . . .").

That fact-intensive record ordained the result here.

Petitioner insisted, for example, that selective disclosure was needed in order to facilitate "cooperation" with government investigators. App. 24a. But the Tenth Circuit easily recognized that the record did not support that contention. "Most telling" was Qwest's disclosure of protected materials "in the face of almost unanimous circuit-court rejection of selective waiver in similar circumstances, and despite the absence of Tenth Circuit precedent." App. 25a.[10] Moreover, the "record is equally deficient" concerning whether the government agencies "may have independently gained access to the Waiver Documents by invoking other means or theories, such as the crime or fraud exception." App. 26a. Indeed, the

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[10] Other circuits are in accord. *See, e.g.*, *Steinhardt Partners*, 9 F.3d at 236 ("that a party facing a federal investigation and the prospect of a civil fraud suit must make difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine"); *Westinghouse*, 951 F.2d at 1426 ("[W]e do not think that a new privilege is necessary to encourage voluntary cooperation with government investigations. . . . We find it significant that Westinghouse chose to cooperate despite the absence of an established privilege[] protecting disclosures to government agencies.").

DOJ had raised that very possibility in its mandamus briefing. *Id.* And, if selective waiver "were as essential to government operations as Qwest claims," one would have expected the DOJ to support Qwest's position. *Id.* Instead, in its mandamus briefing, the DOJ "carefully took no position on the parties' dispute." *Id.* "It would appear, then, that the government's interest is not as Qwest portrays it." *Id.*[11]

Notably, Qwest's supposed "cooperation" with the government was half-hearted at best—and deliberately calculating at worst. Despite handing over 220,000 pages of documents it asserted were protected by either attorney-client privilege or the work-product doctrine, Qwest *withheld another 390,000 documents* from the government—on privilege grounds! App. 30a. Thus, Qwest deliberately "hedged its bets" by choosing to release some privileged documents while retaining others, *id.*, and patently undermined its position that the shield of selective waiver is necessary in order to ensure cooperation. With its actions, Qwest vividly illustrated that its selective waiver served no underlying policy, but was a strategy designed to allow Qwest to pick and choose among its opponents—improperly "waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others." *Permian*, 665 F.2d at 1221; *accord* Moore, *supra*, §26.49[5][g]. Such gamesmanship is abhorrent to the animating principles behind evidentiary privileges.[12]

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[11] Plus, the "culture of waiver" that Petitioner decries (Petition at 22) seems to be lessening, as evidenced by the Sentencing Commission's recent promulgation of an amendment that deletes language in the Sentencing Guidelines that "could be misinterpreted to encourage waivers." *Sentencing Guidelines for United States Courts*, 71 Fed. Reg. 28063, 28073 (May 15, 2006). The amendment will take effect on November 1, 2006, unless Congress intervenes. *Id.* at 28063; App. 38a.

[12] *See also Columbia/HCA Healthcare*, 293 F.3d at 307 (selective waiver cannot be used "to transform the work product doctrine into another 'brush on the attorney's palette,' used as a sword rather than a shield")

Moreover, the record demonstrates that the Agreements were full of holes. True, by their terms Qwest asked the DOJ and SEC to maintain the confidentiality of the formerly privileged documents—but only within the limits set forth by the Agreements themselves. *See, e.g.*, App. 69a ("The Staff will maintain the confidentiality of the Confidential Materials pursuant to this Agreement . . . ."). And those limits were set far beyond the government agents' eyes only, allowing disclosure to other government agencies—*and even to civilian third parties*. For example, the April 15, 2003, Agreement specified that the DOJ could make "full use of any information" it obtained under the Agreements in furtherance of its investigation,

> *including, without limitation*, analyses, *interviews*, grand jury proceedings, court proceedings, consultation with and support of other federal, state or local agencies, *consultations with experts, or potential experts*, and the selection and/or retention of testifying experts.

Ex. 3 to DOJ Response, at 1. As plaintiffs' counsel noted at the Tenth Circuit oral argument on the mandamus petition, the Agreement's plain terms would allow the government to box up all 220,000 documents and ship them to outside accounting experts—utterly destroying any protections the documents may have had. The U.S. Attorney in Denver readily acknowledged that the Confidential Materials had not been kept confidential:

> [T]he United States Attorney's Office has introduced certain [Qwest] documents containing legal advice into

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(citation omitted); *Sealed Case*, 676 F.2d at 825 ("where lawyer and client attempt to manipulate the work product privilege . . . the cause of justice compels disclosure, and a waiver is implied"); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1370 (D.C. Cir. 1984) ("A client cannot waive that privilege in circumstances where disclosure might be beneficial while maintaining it in other circumstances where nondisclosure would be beneficial.").

> evidence in a criminal trial, called certain attorneys as witnesses at trial, interviewed in-house and outside attorneys, and produced much of the alleged privileged information as discovery in the three separate criminal prosecutions resulting from its investigation. In addition, many of the alleged privileged documents were made exhibits to SEC investigative testimony and discussed during such testimony.

App. 77a. Nor did the Agreements require the government "to segregate material obtained from Qwest, file it under seal, keep records of its use, or otherwise deal with the information in any special way." App. 76a-77a. Indeed, the U.S. Attorney "has not attempted to calculate the quantity" of Confidential Materials "that has been further disseminated to third parties." *Id.* at 77a.

Before the Tenth Circuit, Qwest even conceded that "*it is unknown* how many or which of the Waiver Documents the agencies have used or disclosed, how those uses or disclosures occurred, *who might have had access to the Waiver Documents, and the extent of continuing disclosures.*" App. 27a; *id.* at 28a ("At oral argument, Qwest essentially conceded that those *widely distributed* Waiver Documents have lost any protection they once enjoyed.").

Given those concessions and the flimsy protections the Agreements provided, the Tenth Circuit's holding is both unsurprising and undeserving of this Court's review.

III. THE AVAILABILITY OF SELECTIVE WAIVER IN CONNECTION WITH GOVERNMENT INVESTIGATIONS IS BETTER LEFT FOR CONGRESS TO DECIDE

Petitioners assert that *Proposed* Rule of Evidence 502, which suggests enacting some form of selective waiver, shows both the importance of and the merits of its position. Petition at 23-25. Ironically, however, that the Rule has even been

proposed undermines Petitioner's argument that this Court's premature intervention is necessary, and further militates against certiorari review here.

First, that the Advisory Committee on Evidence Rules has even proposed such a rule shows that there was no such selective waiver in existence generally when Qwest first decided to gamble by handing over privileged documents only to one set of adversaries. "[I]n the face of almost unanimous circuit-court rejection of selective waiver in similar circumstances," App. 25a, Qwest rolled the dice and lost. *See also id.* at 30a ("It is difficult to understand how a rejection of selective waiver will work an unfairness on Qwest when Qwest disclosed the Waiver Documents in the face of the known threat from Plaintiffs, the absence of Tenth Circuit precedent, and a dearth of favorable circuit authority."). Certiorari should not be granted simply to undo a losing litigation gamble.

Second, as Petitioner points out, because the proposed Rule would affect evidentiary *privileges*, by statute it must be enacted by Congress. Petition at 24 n.15; *see also* 28 U.S.C. §2074(b) ("Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."). In other words, rules affecting evidentiary privileges occupy such a rarified place in our legal system that the ultimate responsibility for their promulgation is reserved to the legislative branch. *In re Grand Jury Proceedings*, 103 F.3d 1140, 1155 (3d Cir. 1997) (Congress "has recognized the importance of privilege rules insofar as the truth-seeking process is concerned. . . . It did so by identifying and designating the law of privileges as a special area meriting greater legislative oversight.").

This makes sense, as legislatures and rule-making bodies, more so than courts applying (or creating) common law, "are endowed with tools to marshal evidence, facts, and experience from numerous and diverse sources that can support

more dramatic and immediate creation of new rules or modifications of old rules." App. 39a. Thus, whether a nationwide evidentiary privilege rule allowing for selective waiver is regarded as a "new" rule, or merely a gloss on existing evidentiary rules, it is of sufficient importance that it is rightly reserved to Congress. *See, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972) (rejecting a proposed journalists' privilege against compelled testimony, and noting Congress's "freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary"); *see also Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (rejecting proposed privilege for peer review materials, while explaining that the "balancing of conflicting interests of this type is particularly a legislative function"); *M.I.T.*, 129 F.3d at 685 (rejecting selective waiver while explaining that "such agencies usually have means to secure the information they need and, if not, can seek legislation from Congress"). Given the foregoing, it makes more sense for this Court to let the rule review/comment and legislative enactment process work out.

Finally, it is doubtful that the precise issue raised by Petitioner and its uniquely porous Confidentiality Agreements will trouble the lower courts. Either Proposed Rule of Evidence 502 will eventually rule the day or, in its absence, the circuits will continue to hew to the clear majority trend against selective waivers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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